



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: DECEMBER 07, 2022

IN THE MATTER OF:

Appeal Board No. 622166

PRESENT: MICHAEL T. GREASON, MARILYN P. O'MARA MEMBERS

In Appeal Board No. 622166, the claimant appeals from the combined decision of the Administrative Law Judge filed March 22, 2022, insofar as it sustained the initial determination disqualifying the claimant from receiving benefits, effective March 1, 2021, on the basis that the claimant voluntarily separated from employment without good cause.

In Appeal Board Nos. 623538 and 623539, the Appeal Board, on its motion pursuant to Labor Law § 620 (3), has reopened and reconsidered the decisions

of the Administrative Law Judge filed March 22, 2022, insofar as the decisions overruled the initial determinations charging the claimant with an overpayment of \$654 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4) and \$1,500 in Federal Pandemic Unemployment Compensation

(FPUC) benefits repayable pursuant to § 2104 (f) (2) of the Coronavirus Aid,

Relief, and Economic Security (CARES) Act of 2020; and reducing the claimant's right to

receive future benefits by eight effective days and charging a civil penalty of \$100 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearings before the Administrative Law Judge, including hearings held pursuant to a remand order of the Appeal Board, all parties were accorded a full opportunity to be heard and testimony was

taken. There were appearances by the claimant and on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** On April 1, 2020, the claimant filed a claim for unemployment insurance benefits, effective March 30, 2020.

Thereafter, the claimant was employed as a full-time resident counselor by a non-profit social services organization from July 2020 through February 28, 2021. She was hired to work Tuesday through Saturday on the 4 pm to 12 am shift. Any work over 40 hours per week was considered overtime, overtime was not mandatory. The claimant typically worked 50 hours per week. The claimant has hypertension, arthritis, depression and anxiety. Her doctor advised her to reduce her hours and a referral to psychiatry was made in 2021 but she was not advised to quit. In addition, at hire, the claimant was attending college full-time online and the employer allowed her to do some studying at work until its Internet service went off at 11 pm.

The work schedule for the residence was posted with uncovered shifts highlighted. Staff were required to cover shifts if there was absence and the most uncovered shift was from 12 am to 8 am. Staff who worked a 4 pm to 12 am shift were expected to remain to cover the 12 am to 8 am shift and work a double shift if there was no volunteer. There were three full-time residence counselors and a senior counselor in the residence. The claimant's supervisor, IS, the residence manager, sometimes covered the overnight shift but it was discouraged for administrators or residence managers to work overnight shifts as their services were required for daytime activities.

The claimant is a single parent of a then ten-year-old son with a learning disability who was remote schooling. The claimant's childcare provider was a neighbor who provided care to the claimant's son from 4 pm to 12 am but the childcare provider was not always available to remain with him from 12 am to 8 am.

In December 2020 and January 2021, the claimant was required to work additional double shifts due to staff shortages. On two occasions, the claimant had to make emergency arrangements for her sister to pick up her son from the childcare provider who was unavailable to care for the claimant's son from 12 am to 8 am. The claimant requested work in a different residence but there was no 4 pm to 12 am shift position available.

In January, the claimant was out of work for a week due to a health issue. On January 27, 2021, the Director of Residential Services, and IS, held a house meeting because IS was being called in to work for many overnight shifts. The Director told staff that, effective immediately, if uncovered shifts were not voluntarily covered there would be schedule changes. The claimant spoke with the Senior Resident Counselor and IS about her inability to work the overnight shift or have a shift change due to childcare and college. IS told the claimant that if she could not work full-time then she could work per-diem. Per-diem staff choose their shifts and residences.

Due to a change in the schedule of the claimant's childcare provider beginning in early March, the childcare provider would no longer be available to care for the claimant's son.

On January 28, 2021, the claimant sent an email to the Human Resources Manager stating that she would be "dropping to relief staff" and working per-diem for personal and health reasons as of March 1, 2021.

In February 2021, the claimant continued to work the 12 am to 8 am shift in addition to her regular 4 pm to 12 am shift when her childcare provider was available.

On March 8, 2021, while in per diem status, the claimant reopened her unemployment insurance claim and certified her reason for separation from employment was due to lack of work. She reasoned that no other option fit her situation. Thereafter, the claimant received \$654 in unemployment insurance benefits and \$1,500 in FPUC.

In May 2021, the claimant graduated from college and she accepted a nursing position. She continues to work for the employer on a per-diem basis.

OPINION: The credible evidence establishes the claimant's employment ended when she left her full-time position and took a per-diem position with the employer due to multiple issues including lack of childcare for her then 10-year-old son. Leaving her full-time employment for per-diem employment with the same employer is considered a quit for unemployment insurance purposes. Although the claimant was attending college and had some medical issues, the reason she changed from a full-time position to per-diem position was due to a lack of childcare. Significantly, per-diem staff choose the shifts and houses

where and when they want to work so the residence manager suggested the claimant change from full-time to per-diem. The employer admitted it is understaffed. Therefore, double shifts would have continued for the claimant. Leaving employment due to a lack of childcare is considered a quit for good cause for unemployment insurance purposes. Therefore, the claimant voluntarily left her full-time employment with the employer to work in per-diem employment with the employer for good cause pursuant to unemployment insurance law.

As a result, the credible evidence establishes the \$654 in unemployment insurance benefits and the \$1,500 in FPUC benefits were not overpaid, as the claimant was entitled to receive those benefits because she quit her full-time employment for good cause.

Finally, the credible evidence establishes the claimant did not make a willful misrepresentation to collect benefits when she certified that her employment ended due to a lack of work. When the claimant certified for benefits, she did not know changing her status from a full-time employee to a per-diem employee would be considered a quit for unemployment insurance purposes. Under these circumstances, her certification that her employment ended due to a lack of work does not constitute a willful misrepresentation. Therefore, she is not subject to a forfeit penalty or a civil penalty.

The issues of whether the claimant was available for employment and whether she was not totally unemployed are referred back to the Department of Labor for investigation.

DECISION: In Appeal Board No. 622166, the decision of the Administrative Law Judge is reversed.

In Appeal Board No. 623538 and 623539, the decisions of the Administrative Law Judge are affirmed.

In Appeal Board Nos. 622166, 623538 and 623539, the initial determinations, disqualifying the claimant from receiving benefits, effective March 1, 2021, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with an overpayment of \$654 in regular unemployment insurance benefits recoverable pursuant to Labor Law § 597 (4)

and \$1,500 in Federal Pandemic Unemployment Compensation (FPUC) benefits repayable pursuant to § 2104 (f) (2) of the Coronavirus Aid, Relief, and

Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$100 on the basis that the claimant made a willful misrepresentation to obtain benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

The issues of whether the claimant was available for employment and whether she was not totally unemployed are referred back to the Department of Labor for investigation.

MICHAEL T. GREASON, MEMBER

MARILYN P. O'MARA, MEMBER